3. **Repeal of the Rule Would Have No Adverse Effect on the Diversity of Programming or Viewpoints Available to the Public.**

The Second Further Notice reiterates the Commission's longstanding view that the protection of programming and viewpoint diversity must be considered with particular care in assessing any proposed changes in its local ownership rules.[26] CBS has previously set forth at some length its analysis of this position, and respectfully refers the Commission to its earlier submission.[27] In connection with this Second Further Notice, we highlight only a few principal points:

- First, it is clear that the Commission's historic regulation of television and radio station ownership through constraints far more restrictive than those imposed by the antitrust laws derives primarily from a concern for the protection of intellectual competition. The unstated premise of such regulation is that intellectual competition is more fragile than economic competition, and thus in greater need of protection. CBS believes that, in fact, the opposite is true. No economic market includes the number of effective competitors encompassed by the marketplace of ideas. Indeed, the diversity of viewpoints currently and historically provided by outlets for information and entertainment is far greater than the diversity of competing owners within those markets. It is therefore necessarily the case that any market for information or entertainment that is

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[26] Second Further Notice at ¶¶ 3, 7.

[27] Comments of CBS Inc., in Docket No. 19-221 (May 17, 1995) at 8-25.

economically competitive is perforce intellectually competitive.

- Secondly, the belief that diversity of viewpoints is a function of diverse ownership simply overlooks the powerful economic incentive of owners of multiple outlets -- and of the owner of any outlet seeking mass circulation -- to serve a wide range of audiences and to provide a wide spectrum of content. For that reason, commonly owned local radio and television stations today present an enormous variety of decidedly contrasting political and artistic expression in both their news and entertainment programming, and will surely continue to do so in the future.

- Finally, and perhaps most important, where an intellectual market would be generally diverse without government intervention, a policy of maximizing ownership diversity for its own sake flies in the face of fundamental constitutional interests. Because aggressive reporting requires significant resources, a policy of artificially diffusing media ownership over numerous small organizations diminishes the capacity of the press to perform its primary function as a watchdog over government and other powerful institutions. Since the intellectual markets in which broadcast stations compete are richly diverse -- both in ownership and, even more so, in content -- there is no independent justification on diversity grounds for the retention of any of the ownership rules at issue in this proceeding.

On a national level, the intellectual marketplace in which radio and television stations participate encompassed, in our 1995 count, some 1,164 commercial television stations,[28] owned by at least 478 different firms;[29] 363 educational television stations, [30] most independently owned; 11,351 cable systems,[31] owned by 482 MSO's;[32] and 11,767 radio stations[33] with widely diversified ownership. And, according to figures submitted in connection with the Commission's 1984 review of its multiple ownership rules, that market also encompasses some 1,711 daily newspapers owned by a total of 682 firms; 1500 consumer magazines owned by 1,110 firms; 4,742 business publications owned by 3,161 firms; 200 farm publications owned by 164 firms; and 7,497 non-daily newspapers and 4,507 other periodicals owned by innumerable firms.[34] In the next few years, many more participants, such as MMDS and DBS services, telephone companies, and new DAB and ATV services, will add their own contributions to this marketplace of ideas, including both entertainment programming and programming specifically directed

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[28] "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105

[29] Television & Cable Factbook No. 63 -- TV Stations 1995, pp. A 1361-1394.

[30] "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105.

[31] Television & Cable Factbook No. 63 -- Cable Systems 1995, p. ix.

[32] Broadcasting & Cable Yearbook 1995, Vol. 1, pp. D3-D57

[33] "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105.

[34] CBS Comments in Gen. Docket No. 83-1009, citing Standard Rate and Data Service, Inc., Editor and Publisher Yearbook, 1983 and CBS Office of Economic Analysis

toward enhanced public understanding of news and public affairs. Indeed, in its 1984 review of the national ownership rules, the Commission itself recognized that "[i]n terms of viewpoint diversity, the market includes a wide variety of active, energetic organs engaged in the dissemination of ideas.... [T]hese instruments include not simply television and radio, but also cable, video cassette recorders, newspapers, magazines, books, and when they are in operation, MDS, STV, LPTV, and DBS, all of which should be considered when evaluating diversity concerns."[35] This was true thirteen years ago, and is even more obviously true today.

This rich national marketplace of ideas is well reflected in the extraordinarily diverse array of information and entertainment outlets available in local markets throughout the United States. The Joint Economic Study found that no fewer than 8.66 broadcast television stations can be received in the average American home[36] -- representing, for 62% of television homes, just a fraction of the channels brought into the home by cable. Many of these cable channels are substantially devoted to coverage of local issues, typically including public access channels, community access channels and, in a growing number of markets, local all-news channels. Local markets are also served by a plethora of commercial and non-commercial radio stations. Even the 25 smallest television markets are each served, on the average, by no fewer than nine commercial radio stations, while the 25 largest television markets have, on average, at

[35] Report and Order, Amendment of Commission's Rules Relating to Multiple Ownership, 100 FCC 2d 17, 26-27 (1984).

[36] Joint Economic Study at 61.

least 50 commercial radio stations.[37] Local markets are also usually served by at least one daily newspaper, as well as myriad smaller daily and weekly newspapers targeted to specific geographic areas within the same metropolitan region.

Given this enormous number and variety of offerings, it is self-evident that no group owner of a television station and radio stations could hope to dominate debate on public issues in its community with a single viewpoint, even if it set out to do so. As set forth below, it is highly unlikely that any large media owner would attempt such a course.

As the Commission itself has recognized, its traditional equation of "an increase or decrease in outlet diversity with a corresponding change in viewpoint diversity"[38] is unsupported by the facts of the marketplace. If for no other reason, simple economic self-interest compels a group owner to permit each outlet to achieve its own political and artistic sensibility. For the most part, media operators in the United States are corporate entities seeking to maximize profits by identifying and serving the needs of audiences. It is plainly in the interest of such large media companies to present material that speaks to a wide range of audiences. And in order to reach the maximum audience, the group owner must assure that its local outlets reflect a wide range of newsworthy viewpoints encompassing public debate in its service area. There is absolutely no evidence that group owners promote their personal or corporate agendas on their owned radio and television stations to the exclusion or disadvantage of the wide variety of other viewpoints presented in their news and public affairs programs.

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[37] Revision of Radio Rules & Policies 7 FCC Rcd 2755, 2773-77 (1992).

[38] Television Ownership Further Notice at ¶ 62.

In the New York City market, CBS's owned radio and television stations provide a wide a variety of formats and highly diverse news and public affairs programming. WCBS-TV provides 27½ hours per week of local news, and approximately 25 hours per week of national news. Its "Channel 2 The People" and "Sunday Edition" interview programs deal with a far-reaching mix of issues, including teen pregnancy, schools, drugs, AIDS, welfare reform, and housing. WINS-AM offers a 24 hour all-news service to the New York community, featuring, among other things, President Clinton's Saturday radio addresses, and series such as "Good for New York," which reports on people and organizations working to make the city better. WNEW-FM serves the area with a classic rock music format, with regularly scheduled news, weather and traffic. Its "FM" interview program features community leaders discussing subjects such as homelessness, children, crime, drugs and health, and its "New Community Calendar" lists important community events. WCBS-FM offers an oldies music format, also with regularly scheduled news, weather and traffic, and community affairs programs such as "Dialogue One on One," a discussion program with community leaders, and "Focus" and "With You in Mind," interview segments on topics of local interest. WCBS-AM, an all-news format, features, in addition to local and national news, regular programs with elected officials, such as "Ask the Mayor" and "Ask the Governor." Other interview programs on the station, such as "Access" and "Let's Find Out," deal with issue-oriented discussions of politics, poverty, racism, women, the disabled, and minorities. Finally, the New York radio stations recently added to the group in the merger of Westinghouse and Infinity contribute additional diverse programming to this mix, such as the all-sports format of WFAN-AM, which includes regularly scheduled news, weather and traffic, and "Sunday Morning on the Fan," a local program focusing on community issues. WXRK-FM features rock music, regular news, weather and traffic, as well as public affairs programming dealing with community issues and problems on its "K-Rock Magazine."[39]

In sum, any suggestion that the common ownership of these stations has diminished programming or viewpoint diversity in New York City, in any manner, is simply belied by the facts. Diverse formats are utilized by the CBS radio group in New York in order to attract the broadest possible range of audience and advertisers. To force common programming or a common point of view on all of these stations would be to drive away the listeners on whom the stations rely for their survival and success. Indeed, the more diverse these stations are, both in programming formats and in viewpoints, the more successful the group of stations can become. CBS's experience in its other joint radio television markets is exactly the same.[40] For CBS, and for any other group owner, the powerful economic incentives to diversify the programming and viewpoints presented on stations in the same market -- incentives which are far more effective than any governmental mandate -- make regulation directed at the protection of diversity entirely superfluous.

There are currently scores of independent voices in the major markets. In

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[39] Following the Infinity merger, the CBS radio group also includes in New York WZRC-AM, which currently broadcasts Korean language programming pursuant to a Time Brokerage Agreement with Radio Korea New York, Inc.,

[40] For detailed information on the diverse entertainment formats and public affairs programming on the CBS radio and television stations, see Petition for Permanent Waivers of Section 73.3555(c) filed by Westinghouse Electric Corporation and CBS Inc., March 8, 1996; Application for Consent to Transfer of Control of Infinity Broadcasting Corporation to Westinghouse Electric Corporation, filed July 22, 1996 (including one-to-a-market waiver requests).

approving the recent Westinghouse/Infinity merger, the Commission found in New York 117 separately owned radio and television voices, in addition to 36 daily newspapers and cable penetration of 67.9%; in the Los Angeles market, 87 separate broadcast stations, and an additional 30 daily newspapers and cable penetration of 61.4%; and in Chicago, 108 separate radio and television voices, 23 newspapers, and 58.8% cable penetration. Based on this record, the Commission found that granting Westinghouse permanent one-to-a-market waivers in these and three other major markets would not have an undue adverse affect on competition and diversity.[41]

As the Local Market Study demonstrates, a similar conclusion could be reached by the Commission on future mergers in all of the top 50 markets. If the one-to-a-market rule were repealed, 66 separate radio and television voices would remain in New York City after every possible radio-television combination had been consummated. In fact, if all possible mergers occurred in the top 25 markets, there would be no fewer than 20 broadcast voices remaining in each one.[42] And these numbers necessarily understate by a very wide margin the diversity of "voices" that would in fact exist following repeal of the rule, because each of the markets in which these broadcast stations operate has numerous other media outlets which cannot rationally be excluded from an assessment

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[41] See Stockholders of Infinity at ¶ 46. These permanent waivers were granted with respect to the stations involved in the original Westinghouse/CBS merger. Similarly large numbers of independent media voices existed in the other major markets with stations involved in the Infinity transaction, as to which temporary waivers were granted pending the outcome of this proceeding. Id. at ¶ ¶ 88, 90-91.

[42] See Local Market Study, Table 1. While the number of separate radio and television voices in some markets in the 25-50 range would fall below 20 if all possible mergers occurred, it is, as noted above, highly unlikely that every such combination would occur. In any event, the remaining radio and television voices would be supplemented by the scores of other readily available voices noted in the text below.

of viewpoint and programming diversity.[43] Cable systems, for example, carry anywhere from a minimum of 30 to literally hundreds of channels, offering a wide range of news, information, instructional, historical, children's, entertainment, sports and movie services. Many of these systems also have a variety of audio services to supplement local radio stations. Newspapers and magazines also obviously contribute to voice diversity.[44] New services, such as DBS, increasingly add to the mix. In the face of this wealth of information and perspective, the Commission simply does not need to augment the radio and television local ownership limits with a cross-ownership rule to assure that the American people have access to diverse programming and viewpoints, and cannot justify retaining the rule on this ground.

B. IF THE "ONE-TO-A-MARKET" RULE IS RETAINED, IT SHOULD BE MODIFIED TO PERMIT RADIO-TELEVISION CROSS-OWNERSHIP UP TO THE LIMITS PERMITTED UNDER THE 1996 ACT IN ANY MARKET IN WHICH TWENTY INDEPENDENTLY OWNED VOICES WOULD REMAIN FOLLOWING A PROPOSED COMBINATION.

The Commission has solicited comment on a number of alternative proposals for modifying, but not eliminating, the radio-television cross-ownership rule. Specifically, it poses the following questions concerning possible avenues for liberalizing its current rule and waiver standard:

> First, should we extend the presumptive waiver policy to any television market that satisfies the minimum independent voice test? Second, should we extend the

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[43] Television Ownership Further Notice at 3556-3558.

[44] See Stockholders of Infinity at 31, 44.

> presumptive waiver policy to entities that seek to own more than one FM and/or AM radio station? Third, should we reduce the number of required independently owned voices that must remain after a transaction? And fourth, should our 'five factors' test be changed or refined to be more effective in protecting competition and diversity?[45]

The Commission also adds a fifth question to this list by inquiring whether it should extend its presumptive waiver policy to any case in which an entity that already owns a television station in a market seeks to acquire the full complement of radio stations that would otherwise be allowed under the new radio limits.[46]

As noted above, CBS, along with most of the commenters who responded to the Television Ownership Further Notice,[47] believes that the record irrefutably supports repeal of the rule. If the Commission nonetheless determines to retain it in some form, we think it clear that any concerns as to competition or diversity can be fully satisfied by allowing radio-television combinations up to the limits provided in the 1996 Act in any market that satisfies a minimum independent voices test. We further submit that this minimum voices test should be reduced from 30 to no more than 20 broadcast voices,[48] as a matter of rule rather than waiver.

The Local Market Study determined that in some broadcast markets in the 25 to 50 range, the result of the maximum number of television and radio combinations permissible under the 1996 Act would be to reduce independent broadcast voices to

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[45] Second Further Notice at ¶ 67.

[46] Second Further Notice at ¶ 70.

[47] See Second Further Notice at ¶ 21, n. 103.

[48] In the Second Further Notice the Commission recognized that information offered in a number of comments filed in response to the Television Ownership Further Notice supported a reduction in the number of required voices. See, *e.g.*, CBS Comments at 63; Cedar Rapids Comments at 10; Citicasters Comments at 10-11.

relatively small numbers -- in one instance, down to ten. Recognizing that there are many other alternative voices available in each of these markets -- including, as the most obvious, newspapers and individual cable channels -- the Study also examined the effect on concentration if the hypothetical combinations were stopped when 20 separate broadcast voices remained in the market. Not surprisingly, the levels of concentration that would result from a rule which permitted all radio-television mergers which did not reduce the number of independent broadcast voices below 20 are even lower than the levels reported above. In 32 markets, the HHI levels were below 1800 (including 25 of the top 30 markets, and 30 of the top 40). In only six markets (including numbers 46, 47 and 49) did they exceed 2000. The highest HHI was 2242, a figure still quite modest by merger standards.[49] Once again, it must be emphasized that these relatively low measures of concentration almost certainly overstate the actual potential for anticompetitive effects, since they exclude numerous competitive alternatives and ignore the competitive capacity of non-commercial and very small broadcasters. In view of the Study's intentional overstatement of competitive risk, the modest levels of concentration it reports decisively demonstrate that a 20-voice rule -- *i.e.*, a rule permitting all radio-television combinations up to the statutory limit, so long as at least 20 broadcast voices remained in the market following a proposed transaction -- would necessarily relieve the Commission of any possible concern as to significant risks to competition or diversity.

The logic of a "voices" test in the Commission's current waiver policy is to ensure that competition and diversity in a market will not fall beneath a particular

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[49] Local Market Study, Table 2 .

"bedrock" level following a proposed transaction. We see no basis for denying the benefits of this policy to broadcast station owners in any market, regardless of its market rank, in which the designated "voices" test is satisfied. In addition, any standard the Commission adopts for allowing television-radio cross-ownership should be equally applicable to any television owner (or proposed owner) which also proposes to own or acquire the full complement of radio stations in a particular market allowed by the Commission's rules. In our view, there is no reason why existing or proposed owners of radio-television combinations should be required to overcome special regulatory hurdles -- including the present "five factors" test -- in order to take advantage of the enhanced efficiencies made possible by the liberalization of the local radio ownership rules in the 1996 Act. If the Commission determines to retain some version of the one-to-a-market rule, a clear, precise and predictable voices standard would constitute an important step toward fulfilling the vital third goal -- that of certainty -- which the Commission set forth at the outset of this proceeding.[50]

Whatever its utility may have been when adopted in 1989, independent case-by-case analysis of the variables encompassed in the "five factors" test has been rendered superfluous by the demonstrated ability of both the Congress and the Commission to make findings of general applicability as to the criteria most central to competition and diversity. First, on the basis of the record in this proceeding and the many waiver requests granted to date, the Commission can certainly now take administrative notice of the numerous and varied public service benefits which derive from the joint operation of

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[50] See Second Further Notice at ¶ 7.

radio and television stations. Secondly, the classes of broadcast facilities involved in a proposed merger will become progressively less important as stations migrate to the much more flexible digital radio and television world of the future. Thirdly, in the 1996 Act, Congress has clearly indicated its view as to what the law should be with respect to the number of stations that may be owned by an applicant, locally and nationally; further inquiry in this area by the Commission in the one-to-a-market context through cumbersome, individualized "tests" is anachronistic. Fourth, the financial situation of the stations is a criterion which has not been addressed in many of the decisions in which waivers have been granted; indeed, the Commission has stated that it is not a necessary element for satisfaction of the waiver test.[51] Finally, the record before the Commission clearly demonstrates that the current local radio and television ownership limitations, supplemented, if the Commission so requires, by a minimum voices test, will ensure diverse and competitive markets. In other words, the "five factors" waiver test has outlived its usefulness, and is now an administrative burden which can and should be shed.

Elimination of the five factors test is also supported by the reasoning of the United States Court of Appeals for the District of Columbia in WSB v. FCC, 85 F. 3d 695 (D.C. Cir. 1996), in which the Court questioned whether there is a sufficient public interest rationale for failing to apply the presumptive waiver policy (rather than the five-part waiver test) to proposed radio-television combinations involving more than one radio station in the same service where the combination would otherwise satisfy the top

[51] See e.g., Alta Gulf FM, Inc., 10 FCC Rcd 7750 (1995); Newmountain Broadcasting II Corp., 11 FCC Rcd 2344 (1996).

25 television market/30 voices standard.[52] In essence, the Court inquired, if the existence of a minimum number of remaining voices is sufficient to protect competition and diversity following combinations of one or two radio stations with a television station, why does it not equally do so if the transaction involves additional radio stations? CBS submits that it clearly does, and that the record herein demonstrates that the local ownership rules, standing alone, do so as well. The local ownership rules combined with an additional voices test would assuredly do so, and then some.

CBS further submits that any proposed television or radio acquisition which meets whatever test is ultimately adopted by the Commission should be permitted as a matter of rule, rather than waiver. If the Commission wishes to encourage the infusion of capital into broadcasting, buyers and sellers in the radio and television marketplace, and their sources of capital in financial markets, must have the certainty of a clear rule, rather than the ambiguity of a waiver process. The Commission, too, would clearly benefit from the elimination of this process, by conserving administrative resources that are surely better utilized on other matters.

Finally, the Commission has asked what media should be counted towards satisfying a voices test, if one is adopted.[53] It has previously tentatively concluded that cable should be counted, and also recognized that local newspapers contribute to diversity, but indicated its view that electronic media other than cable, such as MMDS,

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[52] 85 F. 3d at 701.

[53] Second Further Notice at 72.

DBS, OVS, and VCRs, should not count.[54] We question the logic of this distinction, particularly as these media continue to grow in capacity and distribution.[55] We also note that emerging technologies, such as satellite radio, multiplexed ATV channels and digital radio, will necessarily add to the mix. Indeed, the very exercise of sifting through the multiplicity of contributors to determine what to count illustrates the robust diversity of these markets, and makes plain that the combination of a television station with the permitted number of radio stations could have little adverse impact on the richness of the menu.

In CBS's view, the sole warrant for the artificial exclusion of any category or class of "voices" in a market would be to arrive at a mechanism which serves the goals of certainty and administrative convenience. A standard which counts only broadcast voices -- commercial and noncommercial television and radio stations -- certainly has the advantage of simplicity. Use of such a limited universe of voices for this purpose, however, must be acknowledged as intentional undercounting, and is another reason for the Commission to adopt a number significantly lower than the 30-voices standard currently utilized to determine presumptive waivers. CBS submits that a test which counted only broadcast voices in the interest of administrative efficiency should require no more than 20. Such a test would limit the Commission's burden and promote

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[54] Id.

[55] For example, 97.3% of cable subscribers are served by systems carrying 30 or more channels and almost 50% of subscribers receive 54 or more channels. Third Annual Report in CS Docket No. 96-113, FCC 94-496, January 2, 1997 at ¶ 22. DBS systems, carrying up to 200 channels, were projected to reach 4.5 million subscribers in 1996, in addition to the current 4.5 million Home Satellite Dish users. Id. at ¶ 5. MMDS systems now rival the average cable system in channel capacity and 29.2 million homes are capable of receiving these wireless cable signals. Id. at ¶ 53.

predictability, while implicitly taking into account the much larger (and increasing) universe of voices which, although somewhat more difficult to count, are nonetheless full contributors to the overall diversity in every market.

C. NEW "FACTORS," SUCH AS AUDIENCE AND ADVERTISING SHARES, SHOULD NOT BE ADDED TO THE WAIVER STANDARD.

In the Second Further Notice, the Commission has raised the possibility of introducing new variables, such as audience shares and advertising revenues, to its current "five factors" waiver test.[56] CBS respectfully suggests that, in an area which cries out for clarity and simplification, the adoption of this proposal would transform what is now a regulatory labyrinth into regulatory quicksand. We can think of few developments less conducive to an efficient or predictable administrative process than Commission involvement in the quagmire of shifting shares, in an industry in which these numbers routinely change from one ratings book to the next, as part of its process of evaluating proposed business transactions.

Wholly apart from the nightmarish procedural possibilities of this proposal, its fundamental defect is that the volatility of audience and advertising shares make them irrelevant to regulatory decisionmaking. Neither the current revenues of a station nor its current share of any particular audience is a proper measure of its market power.[57] Once

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[56] Second Further Notice at ¶¶ 73-76.

[57] CBS submits that the popularity of a given station at any point in time should also be irrelevant to an assessment of the effect of a proposed transaction on viewpoint diversity. The effectiveness of a particular "voice" in attracting listeners or viewers cannot be penalized in the regulatory process without raising substantial First Amendment concerns. For reasons set forth in the text below, such issues can and should readily be avoided on other grounds.

stations acquire licenses to broadcast, and assuming comparable technical facilities, the primary distinction between them is the current effectiveness of their operations -- a factor that is continually in flux.

A radio station sells audience to advertisers, and attracts it through programming. Radio programming consists of a large variety of combinations of music, news, talk and entertainment, all of which are universally available. In television as well, a plethora of program producers and distributors seek to sell their products to stations, and to attract viewers and the advertising revenues associated with those viewers. And of course, radio listeners and television viewers can and do switch from one station to another, instantaneously and without cost. The extent to which any one station is more successful than another in attracting larger or otherwise more attractive audiences at any given moment is solely a function of the success of its current programming and other operational characteristics -- all elements of which are available to its rivals, either immediately or, in the case of some programming, at the conclusion of relatively short-term contracts.

This point is plainly observable in radio, where format changes (or more accurately, programming adjustments) are common, and generally produce audience shifts. Programming adjustments come in all shapes and sizes. Significant changes are not infrequent. Smaller efforts at "fine-tuning," intended either to increase the size or change the demographics of the audience attracted to a station, are virtually everyday occurrences in radio, and seasonal occurrences in television. This constant jockeying for audience, and attendant changes in audience shares, produce considerable swings in revenues and revenue shares. Indeed, even relatively minor changes in ownership, management, programming and even radio personalities can and do rapidly alter audience levels. Radio station revenue shares have fluctuated by between 10 and 20% annually, reflecting frequent changes in audience and advertiser preferences, as well as intense competition among rivals.[58]

A recent example in New York illustrates the volatility of ratings. In the Fall of 1995, WYNY-FM was a country music station with a 1.9 audience share, making it one of the lowest-rated stations in the city. In early 1996, the station changed its format to Dance, and its call letters to WKTU. Within months, the station skyrocketed to first place in the ratings, with a 6.8 share in the Summer of 1996.[59] Measured on a cumulative audience basis -- meaning the number of different people listening to the station each week -- WKTU more than tripled its audience reach, growing from 777,100 to 2,553,900.[60] This example is not an isolated phenomenon. The following schedule, which examines changes in shares of the major demographic groups in a sampling of major markets, demonstrates that, from year to year, audience shares change in the range of 20%:

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[58] BIA Master Access Analyzer, November 96

[59] Arbitron Radio Market Report, New York, Fall 1995-Fall 1996, Monday-Sunday, 6am-Midnight. All persons [redacted]

Weighted Average Absolute Percentage Change in Radio Station Shares Spring 1995 - Spring 1996[61]					
Metro Area	**All Persons 12+**	**All Persons 25-54**	**Men 25-54**	**Women 25-54**	**Teens**
Boston	15.5%	19.6%	21.9%	24.4%	25.2%
Chicago	12.4%	16.8%	19.9%	19.1%	21.6%
Dallas	17.0%	23.0%	28.0%	25.2%	46.2%
Detroit	17.3%	21.7%	23.1%	24.8%	30.1%
Los Angeles	17.6%	19.6%	21.4%	22.6%	21.4%
New York	21.0%	23.2%	22.3%	29.0%	38.6%
Philadelphia	13.5%	14.2%	18.0%	17.0%	24.5%

As would be expected, such wide fluctuations in audience share produce considerable swings in revenues and revenue shares. The following table sets forth the average percentage change in a station's share of home market radio advertising revenues for the periods 1993 to 1994 and 1994 to 1995:

Average Percentage Change in Share[62]		
Market	**Change 1993-94 (%)**	**Change 1994-95 (%)**
Boston	15.7	20.1
Chicago	12.1	12.5
Dallas-Ft. Worth	16.7	14.1
Detroit	14.9	22.2
Los Angeles	12.7	15.0
New York	8.1	12.8
Philadelphia	9.6	10.6

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[61] Arbitron Rating Survey, Spring 1995-Spring 1996.

[62] Source: BIA Master Access Radio Analyzer, November 96. The change in each station's share of total home market radio advertising revenue was calculated for two time periods: from 1993 to 1994 and from 1994 to 1995. That change in share was then expressed as a percentage of the station's average revenue share for the two years involved. In calculating the average change, all changes were expressed in absolute values. Hence, a movement from a 4 share to a 6 share counts the same as a movement from a 6 share to a 4 share. In both cases, there is a change of 2 on a base of 5 (the average of 4 and 6) for a percentage change of 40%.

The number of format changes in these sample markets in the last two years alone amply demonstrates the frequency with which radio stations change their programming to attempt to attract more listeners and revenue. In Los Angeles, for example, there were a total of 20 format changes in the two year period, with four stations changing formats more than once. In New York, there were 31 format changes in that time period, with eight stations changing more than once, and five changing three times. Similar changes occurred in the other sample markets, ranging from 13 to 21 format changes.[63]

The wide fluctuations in audience and revenue shares make clear that these shares cannot be used to predict stations' market rankings over any period of time, and are of no value to the Commission in analyzing the probable effects of station consolidations on competition and diversity. In fact, the only useful measure of competition is the number of available sources of advertising in the market, and the proper inquiry is the identification of the stations that can potentially generate audiences in a particular geographic area, without regard to the actual success of any particular station at any point in time in producing any particular audience. Experience indicates that each station has essentially an equal potential to produce audiences, which is what they all sell to advertisers.

Even assuming that radio and television station advertising is a proper market definition, which we believe is clearly not the case, the foregoing analysis demonstrates that the only rational way to analyze competition in this marketplace is to look at the

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[63] BIA Publications Radio Analyzer, September 4, 1996.

number of stations involved in a proposed merger. This inquiry, in turn, leads one directly to the current structural radio and television station ownership limits, rather than to an analysis of audience and revenue shares. And the evidence is clear that the combination of a single television station with the number of radio stations permitted under the current limits cannot rationally produce concern about the extent of competition or diversity in these markets.

II. THE LOCAL TELEVISION OWNERSHIP ("DUOPOLY") RULE.

The Commission's current local television ownership ("duopoly") rule prohibits common ownership of two television stations whose Grade B signal contours overlap.[64] This rule employs the Grade B contour to approximate a measurement of the geographic market in which a television station operates. The Commission has recognized that identification of the appropriate geographic market is central to a determination whether the current rule is broader than necessary to achieve the intended protection of diversity and competition.[65]

In the Television Ownership Further Notice, the Commission expressed the view that the current Grade B test for prohibited duopolies (approximately 50 to 75 miles) may be too restrictive, and solicited comment on a proposal to narrow the geographic scope of the rule by prohibiting station overlaps on the basis of the smaller Grade A

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[64] 47 C.F.R. §. 73.3555(b).

[65] Television Ownership Further Notice at 3570-74.

contours (approximately 30 to 45 miles).[66] The Commission also raised the question whether the Nielsen Company's "DMA" designations are in any case better measures of local television markets than Grade B signal contours.[67] Most commenters responded by advocating a relaxation of the rule.[68] CBS proposed that it be modified to prohibit only Grade A overlaps, or to use DMAs to identify television markets.[69] We continue to believe, for the reasons earlier stated, that the rule should be modified to permit common ownership of stations if they are in different DMAs. In addition, we believe there is no reason to make a revised rule more restrictive than its predecessor in the relatively unusual circumstances in which a particular DMA is so large as to include two stations whose Grade B contours do not overlap. We therefore suggest that, in this particular instance, common ownership should continue to be permitted if no Grade B overlap exists between the stations.

The record clearly supports a finding that the true geographic arena of competition for a broadcast television station is its DMA. Indications that the marketplace has unambiguously established the DMA as the functional definition of a local television market, include, among others, the following:

- Ratings data for broadcast television stations are complied by the Nielsen Company on the basis of the 211 DMAs, because Nielsen -- a recognized

[66] Id. at 3574, n.144.

[67] Id. at 3540.

[68] See Second Further Notice at ¶ 10, n .26.

[69] See Comments of CBS Inc., in Docket No. 91-221 (May 17, 1995) at 52; Further Comments of Westinghouse Broadcasting Company (Group W) in Docket No. 91-221, (May 17, 1995) at 25-28.

authority on audience measurement in the television business -- defines them as the nation's local television markets. Viewing patterns and other factors are regularly re-evaluated by Nielsen for the purpose of making periodic adjustments in the geographic boundaries of DMAs in order accurately to describe economically valid boundaries for local television markets.

- DMA-based ratings data are used by local advertisers to make their time-buying decisions on local broadcast stations. For this reason, stations located in the same DMA compete against each other; stations in different DMAs do not.[70]

- Television broadcast networks generally have one affiliate in each DMA. It is in a network's interest to avoid duplicating coverage of a local television market with more than one affiliate, since such duplication increases the network's liability for affiliate compensation payments without increasing its audience exposure. It is telling, therefore, that while Grade B contour overlaps frequently occur among the affiliates of each of the three original networks, it is quite unusual to find more than one affiliate of a particular network in any one DMA.[71]

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[70] Joint Economic Study at 88.

[71] Thus, excluding satellite stations, there are only two DMAs in which the CBS Television Network has more than one affiliate.

- The network non-duplication protection granted by the CBS Television Network to its affiliates covers only that portion of the zone permitted by the Commission's rules which falls within the station's DMA.[72]

Broadcast television stations may have viewers outside their DMAs, but they do not compete for these viewers. Their programming is targeted to the viewers inside their DMAs because these are the principal viewers that advertisers will pay to reach. And since a station's Grade B contours frequently extend beyond the geographic borders of its DMA, the duopoly rule's prohibition on Grade B contour overlap between co-owned stations frequently has the effect of barring co-ownership of stations that do not compete with each other in any material respect. The overbreadth of the rule thus impedes efficiency with no compensating benefit to the public.[73] As the Joint Economic Study observed:

> Television stations do not significantly compete in the sale of advertising with television stations located outside the DMA. . . . There is no significant competitive effect from a merger of stations in separate markets, and no competitive rationale for prohibiting such mergers. [74]

Similarly, stations in different DMAs do not compete against each other either for network affiliation or for the local exhibition rights to syndicated programs. As noted above, networks only rarely seek to affiliate with more than one station in a DMA,

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[72] The Commission's rules generally limit the area in which network non-duplication protection may be granted to a 35-mile zone around the reference points of a station in the top 100 markets, or a 55-mile radius from the reference points of a station in other markets. 47 C.F.R. Sec. 76.92 (g). These zones are generally, but not always, smaller than a station's DMA.

[73] See Television Ownership Further Notice, at ¶ 116; Second Further Notice at ¶ 11.

[74] Joint Economic Study at 88-89.

since such multiple affiliations would increase their liability for compensation payments without increasing their audience exposure. And even apart from the fact that television stations do not compete for audiences outside their DMA because they cannot sell those audiences to advertisers, they are effectively precluded from seeking exclusive exhibition rights to non-network programming beyond their DMA by Commission rules.[75]

The Commission has suggested, as one possible modification of the rule, that a DMA test for prohibited duopolies be supplemented with a Grade A contour standard, so that common ownership of television stations in different DMAs would be permitted only if their Grade A signal contours did not overlap.[76] The Commission suggests this may be necessary because television stations in neighboring DMAs with such overlapping signal contours may in fact be significant competitors, and their common ownership might reduce the diversity available to the viewers in the overlap area. As noted above, however, television stations sell advertising time based on the viewership reported by Nielsen for the viewers inside their respective DMAs; stations in different DMAs compete neither in the acquisition of programming rights nor for audience. For example, the CBS Television Network maintains an affiliation with WUSA, Washington, D.C., even though its Grade A contour significantly overlaps with that of WJZ-TV, a CBS owned station in Baltimore. These stations do not, in fact, meaningfully compete for viewers. While its signal can be received in parts of Washington, WJZ-TV simply is

[75] Section 73.658 (m) of the Commission's rules generally prohibits the acquisition of exclusivity rights that would bar the licensing of the same program to another station located in a community of license more than 35 miles away -- a radius which generally falls short of covering a station's own DMA, much less an adjoining one.

[76] Second Further Notice at ¶ 13.